

MARRIAGE, MULTI-CULTURALISM, MINORITY RIGHTS AND CONSTITUTIONAL LAW

Shahar Lifshitz and Rhona Schuz***

This volume of the Family in Law Review is the product of two international conferences in the field of family law which took place in Israel. The first, at Bar Ilan University in 2008,¹ was on Marriage and Constitution. The second was a Regional Conference of the International Society of Family Law (ISFL) on Family Law in a Multicultural Environment; Civil and Religious Law in Family Matters² which took place in 2009 at the Center for the Rights of the Child and the Family at Sha'arei Mishpat Law College and Bar Ilan University.

The Conference on Marriage and Constitution dealt with the fascinating interface between marriage law and constitutional law. The participants in the conference included prominent researchers in the fields of family law and constitutional law. The conference combined historical research, comparative aspects (the main legal systems which were discussed were the USA, the EU, England, Germany, Israel and Pakistan) and normative constitutional discourse.

The sessions at the conference focused mainly on the influence of different constitutions on the content of marriage law. Thus, for example, comparison was

* Professor of Law, Bar Ilan University. Formerly visiting scholar and Berkowitz Fellow at New York University Law School; visiting Professor of Law and Distinguished Fellow of Jewish Law and Interdisciplinary Studies at Cardozo Law School and Visiting Professor at Columbia Law School.

** Senior Lecturer and Co-Director of the Center for the Rights of the Child and the Family at Sha'arei Mishpat Law College and visiting lecturer at Bar Ilan University. Formerly Lecturer in Law at the London School of Economics.

1 Organized by Professor Shahar Lifshitz.

2 Co-convened by Professor Lynn Wardle of Brigham Young University, Dr. Rhona Schuz, Co-Director of the Center for the Rights of the Child and the Family at Sha'arei Mishpat Law College, and Professor Shahar Lifshitz of Bar Ilan University, with the assistance of a scientific committee which included Dr. Ayelet Blecher-Prigat of Sha'arei Mishpat Law College, Professor Ruth Halperin-Kaddari, Chair of Rackman Center at Bar Ilan University, Dr. Benjamin Shmueli, then Co-Director of the Center for the Rights of the Child and the Family at Sha'arei Mishpat Law College, and Professor Anna Singer of Uppsala University, Sweden.

made between constitutions which emphasize the rights of the individual - including the right to marry, the right to divorce and the right not to marry – and constitutions, such as the German constitution, that emphasize the institution of marriage and the need for it to be strengthened by the state. In addition, consideration was given to the influences of the different kinds of constitutions on the legal distinctions between regulation of relationships between married couples and those between unmarried couples; on the widening of the definition of marriage; on the right of married and unmarried persons to parenthood; on the status of non-conventional families; on the right to family unification following marriage; and on secular regulation of religious marriages.

The ISFL Israel Regional Conference also addressed issues relating to marriage and unmarried partnerships, in addition to other aspects of family law, and in particular those concerning relations between parents and children including custody, abduction, adoption and education. The focus of this conference, which brought together distinguished family law scholars from ten different countries, was based on the understanding that in the field of family law, the law of the state is not the only source of social and legal norms for regulating family relationships. Thus, in addition to state law, people who belong to different religions, communities and cultures are exposed to a complex and varied system of norms. Many of the conference presentations included positivist and normative discussion of the spectrum of possible approaches that state law might adopt towards the non-state systems. These ranged from combating "unacceptable" practices through use of criminal law at one end of the spectrum to pluralistic state systems which provide for different legal norms to apply to different groups in relation to family matters, at the other end. In between these extremes, there are more moderate forms of recognition of non-state systems, for example, by means of contract law or arbitration. Particular attention was paid to the conflicts between majority and minority cultures and to the tension between the fear of imperialism and cultural coercion on the one hand and the desire to impose a shared system of values and the concern for the human rights of individuals within the minority groups on the other hand. Finally, the discussions at the conference highlighted the special role of religion in the shaping of family law, both in state law and in alternative systems. Accordingly, in addition to the internal discussion within family law and the constitutional and multicultural discourse in relation to regulation of religious systems within family law, it was noted that there is also a need to consider these issues within the wider context of questions concerning the relationship between state and religion.

In this volume, we publish five of the papers that were presented at the two conferences. These articles provide an interesting prism of the subjects that were discussed at these conferences and insights that they raised.

Laura Alascio Carrasco and Ignacio Marin Garcia's paper, "With or Without You: Regulation of Divorce and Incentives, Economic Analysis of No-Cause Divorce", discussed the implications of the introduction of no-fault divorce in Spain, a process which has taken place in most Western countries, largely as a result of widespread acceptance of secular philosophy in relation to family life instead of the religious conceptions of marriage which prevailed previously. The methodology of the research presented in the article is based on economic analysis of law. In addition, the article illustrates the tension that divorce laws arouse between public interests and individual interests and between constitutional rights of individuals and the desire to protect private institutions.

Karin Carmit Yefet's article, 'Lifting the Egyptian Veil: A Constitutional Road Map to Female Martial Emancipation in the Islamic World', also deals with divorce law, but from a completely different angle. The focus of this article is on the Muslim world, with specific reference to Egypt. Yefet examines changes in family law from the perspective of equality for women, whilst highlighting the tensions between the civil liberal constitution and religious family law, which in most Islamic countries forms part of the state law. The article clarifies the complex ways in which religious law may develop and the different forces which are acting today in relation to equality for women in the Islamic world.

In contrast to the Islamic world, in which the religious law is part of state law, in the United States the official state law is civil and secular. Nonetheless, Michael Broyde in his article, "Some Thoughts on New York State Regulation of Jewish Marriage: Covenant, Contract or Statute?", demonstrates that even in a country, such as the United States, which is firmly committed to a regime of complete separation between religion and state, at the end of the day there is religious regulation of marriage and that there is a need for the state to take a position in relation to this regulation. Broyde, an American researcher and Orthodox Jewish Dayan (religious judge) focuses specifically on the New York *Get* Law, which deals with situations in which Jewish couples married both civilly and religiously, but when the marriage comes to end one of them is satisfied with civil divorce and refuses to co-operate in arranging a religious divorce. The discussion in the article presents a complex picture of the role of the state in marriage and of its interaction with the content of religious law.

Michael Freeman's article, "Culture, Childhood and Rights", turns from marriage law to child law. The article illustrates the tension between the commitment of almost all legal cultures, as well as global Conventions, to the standard of the best interests of the child and his rights and to the concrete application of the concept of the welfare of the child in different countries and especially within minority cultures. In particular, the article's critical analysis of an English House of Lords' decision, upholding restrictions on the wearing of Islamic dress by teenage girls at school, highlights the tension between state law, community norms and the concepts of family and child autonomy, all of which play a role in determining the welfare of the child.

Johanna Schiratzki in "Banning God's Law in the name of the Holy Body – The Nordic Position on Ritual Male Circumcision," also deals with the tensions between different norms in relation to the welfare of the child and the respective roles of state, community and family in determining the best interests of the child. Schiratzki focuses on the approach of different communities within the Nordic States to the practice of ritual male circumcision. Her discussion illustrates how the normal tensions within family law become more complex when religious norms are involved together with irreversible actions in relation to minors.

In addition to the articles presented in this volume, six additional papers that were presented at the ISFL Israel Regional Conference have been published in parallel by the University of Utah School of Law in Volume 12:2 of *Journal of Law and Family Studies*. We hope that the papers in this volume will contribute to greater understanding of some of the major issues and challenges facing family law throughout the world at the close of the first decade of the twenty first century.